1992

Paul J. Middlestadt v. Board of Review of the Industrial Commission of Utah; Montain Fuel Supply; Continental Casualty; Comtrol Inc.; Workers Companesation Fund of Utah; and Employers Reinsurance Fund : Brief of Respondent

Utah Court of Appeals

Theodore E. Kanell; Richard G. Sumsion; James R. Black; Benjamin J. Sims; Erie V. Boorman; Attorneys for Respondents.
Hans M. Scheffler; Attorney for Petitioner.

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OCKET NO. 920237 IN THE UTAH COURT OF APPEALS

PAUL J. MIDDLESTADT	:	
Applicant/Petitioner,	:	
v.	:	Priority No. 7
BOARD OR REVIEW of the Industrial Commission of Utah; MOUNTAIN FUEL SUPPLY; CONTINENTAL CASUALTY; COMTROL, INC.; WORKERS COMPENSATION FUND OF UTAH; and EMPLOYERS' REINSURANCE FUND	:	Case No. 920237-CA
Defendants/Respondents.	:	

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BRIEF OF RESPONDENT MOUNTAIN FUEL SUPPLY

STATEMENT OF JURISDICTION

Jurisdiction is vested in this court pursuant to Utah Code Annotated Sections 35-1-82.53 (2), 35-1-86, and 63-46b-16 of the Utah Administrative Procedures Act.

STATEMENT OF ISSUES

1. Do the filing limitations requiring a claimant to apply for permanent partial disability payments within eight years after the date of his injury as found in Utah Code Ann. §35-1-65 and 35-1-66 of the Worker's Compensation Act violate the open courts provision of the Utah Constitution?

2. Does Utah Code Ann. §35-1-65 and 35-1-66 of the Worker's Compensation Act requiring workers to file claims for benefits within eight years from the date of their injury violate the equal protection clause of the Utah Constitution?

STANDARD OF REVIEW

Since this action involves a final appealable administrative order from the Industrial Commission (Commission), the Utah Administrative Procedures Act (hereinafter referred to as "UAPA") applies and vests in this court the authority to grant relief when the Commission "has erroneously interpreted or applied the law. . . ." Utah Code Ann. §63-46b-16 (4) (d) (1989). See also Avis v. Board of Review, 837 P.2d 584, 586 (Utah App. 1992). UAPA also allows this court to extend relief to a petitioner where "the statute or rule on which the agency action is based is unconstitutional on its face or as applied." Utah Code Ann. §63-46b-16 (4) (a) (1989).

In reviewing the application or interpretation of a law a correction of error standard applies and this court is entitled to give no difference to the Commission's interpretation of the law involved. Avis, 837 P.2d at 586. See also Anderson v. Public Service Commission, 190 Ut. Adv. Rpt. 24, 25 (Utah 1992) (citing Savage Industries v. State Tax Commission, 811 P.2d 664, 669-70 (Utah 1991)).

Under UAPA, the Commission in granted discretion in applying the law to the facts only when "there is a grant of discretion to the agency concerning the language in question, either expressly made in the statute or implied from the statutory language." Avis, 837 P.2d at 586.

Finally, since the Commission is not a court possessing general jurisdiction, it did not have the authority to address the constitutionality of the statutes challenged herein. Id. See also

Velarde v. Board of Review, 831 P.2d 123 125 n.5, (Ut. Ct. App. 1992). Therefore, the interpretation of §35-1-65 and §35-1-66 is a question of law and a correction of error standard of review is applied. Avis, 837 P.2d at 586.

DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

Mr. Middlestadt has challenged the constitutionality of Utah Code Ann. §35-1-65 and §35-1-66 under Article 1 section 11 of the Utah Constitution otherwise known as the open courts provisions and Article 1 section 24 of the Utah Constitution also known as the equal protection clause. The relevant portions of these constitutional provisions and statutes are set forth below. Complete verbatim renditions of the same statutes are included in addendums 1 and 2 attached hereto.

Art. I, Section 11. [Courts open - Redress of injuries]

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, and civil cause to which he is a party.

Art. I, Section 24. [Uniform operation of laws.]

> All laws of a general nature shall have uniform operation.

Utah Code Ann. §35-1-65

> Temporary disability-amount of payment-state average weekly wage defined. In no case shall such compensation benefits exceed 312 weeks at the rate of 100% of the state average weekly wage at the time of the injury over a

period of eight years from the date of the injury.

Utah Code Ann. § 35-1-66

> **Partial disability-scale of payments....-** The commission may make a permanent partial disability award at any time prior to eight years after the date of injury to any employee. His physical condition results from such injuries not finally healed and fixed eight years after the date of injury and he files an application for such purpose prior to the expiration of such eight year period.

STATEMENT OF THE CASE

A. Nature of the case:

Mr. Middlestadt is appealing an order of the Industrial Commission which is dated March 12, 1992. This order denied Mr. Middlestadt's motion for review of an order of partial dismissal[1] issued by the Administrative Law Judge on November 21, 1991. R.54-57.

B. Course of Proceedings:

On May 21, 1991, Mr. Middlestadt filed an application for a hearing before the Industrial Commission of Utah seeking, among other things, temporary total disability and permanent partial disability benefits. R. 11.

On November 10, 1991 the attorneys representing the various parties, including Mountain Fuel Supply, (hereinafter referred to as "Mountain Fuel") met in a conference and discussed the merits of Mr. Middlestadt's application. As a result of that meeting the Administrative Law Judge determined that there was no justiciable

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[1] on going causally related medical expenses to continue.

issue at that time based on the expiration of the eight year benefit period and entered an order of dismissal. R. 15, 38. (See Order of Dismissal attached as addendum #3).

Following the ALJ's decision Mr. Middlestadt filed a Motion for Review with the Industrial Commission. R. at 41-45. This motion was filed on December 17, 1991, and on March 12, 1992, the Commission denied his motion. R. 54-57. (See, Order Denying Motion for Review attached as addendum #4.)

Thereafter, Mr. Middlestadt petitioned this court for a writ of review on April 10, 1992. R. at 59. This court granted petitioner's request and issued a writ on April 10, 1992. R. 61.

C. Disposition by the Industrial Commission:

As stated above, the Industrial Commission affirmed the Administrative Law Judge's order of dismissal and denied Mr. Middlestadt's motion for review on March 12, 1992. In so doing, the Commission concluded that the benefit period limitations found in Utah Code Ann. § 35-1-65 and § 35-1-66 barred his claims. R. 54-57.

STATEMENT OF FACTS

Respondent essentially agrees with the facts as set forth in Mr. Middlestadt's brief. However, any facts connected or related to Mr. Middlestadt's injuries on December 5, 1980 do not apply to Mountain Fuel, and are therefore irrelevant insofar as Mountain Fuel's position is concerned.

SUMMARY OF ARGUMENTS

Mr. Middlestadt bears the responsibility for showing that the

statutes and the time limitations found therein are unconstitutional. Mountain Fuel does not bear the burden of showing that the statutes are constitutional and this court is entitled to apply what is otherwise been characterized as an intermediate level of scrutiny in its review of the constitutionality of the statutes in question.

Utah Code Ann. §35-1-65 and §35-1-66 are not statutes of repose as Mr. Middlestadt argues in his brief. Instead, they are statutes of limitation or benefit limitations because they limit the period of time in which an injured worker may seek compensation and that limit of time is based on the occurrence of the injury or accident. On the other hand, a statute of repose basis its computation of time on some event unrelated to the accident or injury sustained by the individual. Mr. Middlestadt has claimed that the event as to which the applicable limitation or time period must run are his surgeries which occurred in 1987 and 1990. However, these surgeries are admitted to have resulted from the original injuries sustained by the Mr. Middlestadt in 1976 and 1980. A plain reading of the statute shows that the time period runs from the date of the accident and injury and petitioner's arguments that the surgeries are the event for calculating the time are without merit.

Petitioner also cannot show the existence of any special circumstances which would render him eligible for the equitable exceptions to the statute of limitations. Those exceptions require a showing that either the individual had no way of knowing that

injury had occurred, or had no way of preserving his right to affix or explore the potential liability within the applicable time limitation. Mr. Middlestadt arguments that he could not file for additional benefits until the surgeries occurred ignores the fact that the statutes specifically allow him to file for permanent or temporary partial disability ratings and payments where the worker's injuries are not finally healed or fixed within that time frame. The healing of petitioners injuries or the fixation of such due to the surgeries, are clearly not events contemplated by the statute to extend or toll the limitation. The statute specifically allows for ratings and payments to be made while the injuries are ongoing and not finally healed if the proper application is filed timely.

Mr. Middlestadt has also failed to meet the two pronged analysis as outlined in the Berry line of cases. Mr. Middlestadt had a reasonable alternative remedy under the statute and he is presently eligible and will continue to be eligible for medical payments indefinitely insofar as he incurs medical expenses related to the 1976 and 1980 industrial accidents. Nothing in the law or equity requires that individuals in today's society be given an open period of time in which to seek redress for their injuries or problems. Equity and law simply require that individuals be given a reasonable time to pursue the remedies society affords them.

The statutes in question also clearly meet the legislative objective and reasonable and concise tests as outlined the second prong of Berry. The statutes clearly meet the public policy

concerns of allowing the Industrial Commission to evaluate the merits of any petition or request for benefits by having evidence that is fresh, discoverable and reviewable, and not so distant in time as to be rendered unreliable.

Finally, this court, in Avis v. Board of Review, 837 P.2d 584 (Utah App. 1992) upheld the very statute applicable to Mountain Fuel's case. Mountain Fuel is a party to this action as a result of a injury sustained by Mr. Middlestadt in 1976. In 1976, the applicable limitation period was set forth in Utah Code Ann. §35-1-99 and that statute has been held by the Avis court to be constitutional and not in violation of the open court or equal protection clauses of the Utah constitution.

ARGUMENT

POINT I

UTAH CODE ANNOTATED §35-1-65 AND §35-1-66 ARE CLEARLY STATUTES OF LIMITATION, AND NOT STATUTES OF REPOSE

Utah Code Ann. §35-1-65 and §35-1-66 [2] are not statutes of repose as Mr. Middlestadt argues in his brief but instead are statutes of limitations which affix an outside time limit and require claimants to file within that time period in order to be

[2] Mountain Fuel Supply is a party to this lawsuit as a result of injuries sustained by the plaintiff in 1976. In 1976 the applicable time limitation period was found in Utah Code Annotated section 35-1-99. This section was repealed in 1988 and replaced by a similar section found at Utah Code Ann. section 35-1-98 (2). It is Mountain Fuel's position that insofar as it is concerned, section 35-1-99 is the only applicable provision. However, for the sake of consistency and uniformity, Mountain Fuel will address the issues as stated by petitioner and/or refer to sections 35-1-65 and 35-1-66 in the body of its argument.

eligible for benefits. [3]

Statutes of limitations prohibit suits which are filed after a statutorily specific period of time following the accrual of a cause of action. Avis, 837 P.2d at 587. Statutes of Repose, on the other hand, prohibit suits a certain number of years after a specific event occurs and that event is unrelated to or occurs without regard to when a petitioner's cause of action accrues. Id. In other words, a statute of repose can serve to bar a cause of action even where an individual's cause of action has not accrued. The most common statutes of repose were often enacted in the products liability context where the event affixing the time period was the date the product was manufactured. The time would count from the date the product was manufactured and at the end of the statutory period, that product no longer posed any liability risk to the manufacturer.

Such a result occurred in the case of Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985). In Berry the plaintiff was killed in an airplane accident and attempted to sue the manufacturer of the airplane on a products liability theory. However, a statute of repose was in effect which precluded suit a certain period of time after the manufacture of the airplane and regardless of when a party was injured by the product. In Berry, and subsequent cases dealing with various statutes of repose, the Utah Supreme Court has declared such statutes unconstitutional because they completely bar

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[3] The Worker's Compensation Fund has referred to the time limits as benefit limitations. Either way the operable events that start the limitation running are the accident and injury date.

an individual's right to sue regardless of when that individuals cause of action accrues. [4]

The language in §35-1-65 and §35-1-66 shows that they are statute of limitations because they run "from the date of injury, when the cause of action accrues, not from a point in time unrelated to when the cause of action arose." Avis, 837 P.2d at 587.

Utah Code Ann. § 35-1-65 states in pertinent part:

> In no case shall such compensation benefits exceed three hundred and twelve weeks at the rate of 100% of the state average weekly wage at the time of the injury over a period of eight years from the date of injury.

Section 35-1-66 prior to the 1988 amendment which does not apply in this case, stated that:

> The commission may make a permanent partial disability award at any time prior to eight years after the date of injury to any employee whose physical condition resulting from such injury is not finally healed and fixed eight years after the date of injury and who files an application for such purpose prior to the expiration of such eight year period.

Clearly the language of both statutes link the time limitation period to the accrual of the cause of action or in other words, the date in which in an individual was injured. Hence, section 35-1-65

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[4] Statutes of Repose have met with increasing disfavor in Utah. See, Wrolstad v. Industrial Commission of Utah, 786 P.2d 243 (Ut. Ct. App. 1990); Horton v. Goldminer's Daughter, 785 P.2d 1087 (Utah, 1989); Sun Valley Water Beds of Utah, Inc. v. Herm Hughes & Sons, Inc., 782 P.2d 188 (Utah, 1989). To Mountain Fuel's knowledge, only one statute of repose presently exists in Utah law. That statute of repose is the medical malpractice limitation found at Utah Code Ann. §78-14-4 (1992).

cuts off an individuals right to compensation "eight years from the date of the injury." Id. Section 35-1-66 similarly allows for permanent partial disability awards "at any time prior to eight years after the date of injury." Id. It further requires application for permanent partial disability awards within that eight year period. Id.

Therefore, Utah Code Ann. §35-1-65 and §35-1-66 are not statutes of repose and the analysis found in "the Berry line of cases is not directly applicable . . . . " Avis, 837 P.2d at 587.

POINT II

SECTIONS 35-1-65 AND 35-1-66 ARE CONSTITUTIONALLY SOUND BECAUSE THEY SET FORTH A LIMITED BUT REASONABLE TIME IN WHICH TO FILE FOR BENEFITS.

As previously noted, "[s]tate legislatures possess the discretion to enact statutes of limitation, and these statutes are presumptively constitutional." Id. Furthermore, "[a] statute of limitation is constitutionally sound if it should allow a reasonable, not unlimited, time in which to bring suit." Id. (citing McHenry v. Utah Valley Hospital, 724 F.Supp. 835, 837 (D. Utah 1989). It is with the ambit and domain of the legislature to determine what constitutes a reasonable time and such a determination is left to "the judgment of the legislature, and the courts will not inquire into the wisdom of establishing a period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice." Avis, 837 P.2d at 587, (citations omitted).

There are exceptions which are designed to alleviate the

sometimes harsh application of statutes of limitation. These exceptions "involve cases where plaintiff[s] had no way of knowing the injury had occurred until after the statute had run and therefore no way of affixing or exploring potential liability within the statutory period." Id. at 587. However, Mr. Middlestadt has failed to argue any of the above mentioned exceptions. Instead, Mr. Middlestadt has chosen to argue that the statutes are actually statutes of repose and therefore attacks the same under the open courts and equal protection provisions of the Utah Constitution. As previously mentioned, the open courts analysis and two prong test as found in the Berry line of cases, is not directly applicable to statutes of limitation. Therefore since Mr. Middlestadt has failed to argue or set forth any circumstances which would make him eligible for any of the exceptions to statutes of limitation his claims of constitutional violation are without merit and should be summarily dismissed.

POINT III

SECTIONS 35-1-65 AND 35-1-66 ARE NOT VIOLATIVE OF THE OPEN COURTS PROVISION OF THE UTAH CONSTITUTION.

Assuming arguendo that this court rejects Mountain Fuel's position that §35-1-65 and §35-1-66 are statutes of limitation, and hold that they are statutes of repose, the statutes nevertheless pass the two prong test as outlined in the case Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985).

Article 1, Section 11 of the Constitution of Utah, otherwise known as the "open courts" provision, provides that "[a]ll courts

shall be open, and every person, for an injury done to him and person, property or reputation, shall have a remedy by due course of law . . . ." In the Berry case, the Utah Supreme Court in striking down the products liability statute of repose under the open courts provision, outlined a two prong test "which contemplates both the individual rights constitutionally protected by the open courts provision and the legislative interest in promoting the social and economic welfare." Velarde, 831 P.2d at 127.

> First, section 11 is satisfied if the law provides an injured person an effective and reasonable alternative remedy "by due course of law" for vindication of his constitutional interest. The benefit provided by the substitute must be substantially equal in value or other benefit to the remedy abrogated in providing essentially comparable substantive protection to one's person, property, or reputation, although the form of the substitute remedy may be different . . . .
>
> Second, if there is no substitute or alternative remedy provided, abrogation of the remedy or cause of action may be justified only if there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective.

Id. (citing Berry, 717 P.2d at 680) (emphasis added). Statutes survive the Berry analysis if either one of the two prongs of the test is met.

POINT A
MR. MIDDLESTADT HAD AN EFFECTIVE REMEDY UNDER §35-1-65 AND §35-1-66 HAD HE FILED A TIMELY CLAIM FOR COMPENSATION WITH THE COMMISSION.

In the case of Jackson v. Layton City, 743 P.2d 1196 (Utah

1987), the Utah Supreme Court addressed a constitutional attack based on the open courts provision of the Utah Constitution. The claims made by the plaintiffs in Jackson also are similar in nature to the present claim of Mr. Middlestadt. Mr. Middlestadt's brief is essentially arguing that no statute of limitation should apply to his claim and that he should be granted an open ended opportunity to pursue his remedy under the workmen's compensation statutes. However, nothing in law or equity requires that individuals be given an unlimited period of time following an accident or injury in which they can pursue their claims.

In the Jackson case, one of the plaintiffs sustained injuries in February of 1979 while sliding on a hill that was constructed and maintained by Layton City. This hill was constructed in November 1974. Plaintiffs filed their claim against Layton City on August 14, 1983, a date approximately 4 1/2 years after the accident and close to nine years after the date the sledding hill was constructed. The trial court held that plaintiffs claim was barred by the four year general statute of limitations applicable to personal injuries caused by negligent conduct. On appeal, the plaintiffs argued that the seven year statute of limitation found that Utah Code Ann. Section 78-12-25.5 was the applicable statute of limitations instead of the four year period for filing personal injury actions as found at Utah Code Ann. § 78-12-25 (2). Section 78-12-25.5 serves to limit a time in which a suit can be filed based on a defective and unsafe condition of an improvement to real property to seven years from the date of the construction of that

condition or improvement.

Plaintiffs attacked this statute under the open courts provision claiming that the statute eliminated their cause of action even before it actually accrued simply because the hill was constructed nine years prior to their injuries and hence beyond the seven year statute. The Utah Supreme Court disposed of plaintiffs constitutional attacks based on the first prong of the Berry analysis which requires that a plaintiff be given a reasonable alternative remedy. The Jackson court held that the plaintiff "had an effective remedy against Layton City as owner in possession of the property that could have been filed within four years from the date of the injury. They cannot invoke Berry to excuse them from their own dilatory conduct." Id. at Jackson, 743 P.2d at 1199.

Mr. Middlestadt's position is strikingly similar to those arguments made in the Jackson and Avis cases. The facts are undisputed that Mr. Middlestadt was aware of his injuries in 1976 and in 1980 as evidenced by the fact that he received worker's compensation benefits for both injuries. Unfortunately, just as in the Jackson and Avis cases, Mr. Middlestadt had an alternative remedy but failed to file his claim with the Commission within eight years from the date of his injuries. It is important to note that the eight year statute of limitations provided by Utah Code Ann. §35-1-65 and §35-1-66 affords Mr. Middlestadt twice the amount of time to pursue his claims as he would have had had he otherwise been subject to the four year statute of limitations applicable to personal injury claims. See Utah Code Ann. §78-12-25. (1982). Mr.

Middlestadt clearly had an effective alternative remedy under the act but his failure to timely pursue that remedy deprives him of the right to proceed.

Mr. Middlestadt relies heavily on the case Wrolstad v. Industrial Commission of Utah, 786 P.2d 243 (Ut. Ct. App. 1990) in asserting his open courts claim. However, Wrolstad is significantly different and easily distinguishable from Mr. Middlestadt's situation. In Wrolstad, the plaintiff developed asbestosis some ten years after leaving his employment as an electrician. Mr. Wrolstad's claims fell under the state Occupational Disease, Disability Compensation Act and that act had a statute of repose which required Mr. Wrolstad to file within one year after the termination of his employment in order to be eligible for workmen's compensation benefits. This particular statute, Utah Code Ann. §35-2-13(a)(2), was clearly a statute of repose because the claim was barred before it arose. The Utah Court of Appeals found that it violated the open courts provision of the Utah Constitution.

However, the statutory provision at issue in Wrolstad is completely different from the statutes at issue here. From 1976 on, Mr. Middlestadt was aware that he had suffered an industrial accident and was further aware of his ongoing injuries and the possible long term effects from those accidents. Just as the petitioner in the Avis case was aware of his injuries, so to has Mr. Middlestadt been aware of his condition "over a period of several years." Avis, 837 P.2d at 588. It follows that Mr.

Middlestadt could have filed for the compensation he now seeks within the statutory period, which began running on the date of his injury and not the date he terminated his employment as in the Wrolstad case. Id. What Mr. Middlestadt is seeking is just what Mr. Avis sought in the Avis case. Mr. Middlestadt "seeks a rule which would postpone running of the statute until he 'discovered' the full extent of his injury. The workman's compensation statute, however, does not require stabilization before filing for benefits." Id. In short no matter what remedy Mr. Middlestadt had or chose to pursue, he would still be subject to a statute of limitations. Id. "His alternative remedy was to timely file." Id.

Sections 35-1-65 and 35-1-66 clearly allow Mr. Middlestadt to seek compensation prior to the stabilization of his injuries and any intimation on the part of Mr. Middlestadt that the surgeries on his back, which were admittedly secondary to the injuries sustained in 1976 and in 1980, are new injuries warranting new benefits is clearly in error. If anything, the surgeries were designed to stabilize and finally fix the extent of Mr. Middlestadt's injuries in 1976 and 1980.

It is also important to note that the workman's compensation act itself has been held to be a constitutionally valid statutory scheme and offers a reasonable and constitutionally sound alternative remedy. Masich v. U.S. Smelting and Ref. and Min. Co., 191 P.2d 612, (Utah 1948) (appeal dismissed, 335 U.S. 866).

POINT B

SECTIONS 35-1-65 AND 35-1-66 SERVE A CLEAR LEGISLATIVE OBJECTIVE AND ARE REASONABLE AND CONCISE IN ACHIEVING THAT OBJECTIVE

In applying the second prong of the Berry analysis it is helpful to first contrast Mr. Middlestadt's claims with the claims made in the Wrolstad case. In Wrolstad this court invalidated section 35-2-13(a)(2), which set forth a one year repose period for non-silicosis occupational disease claims resulting in total disability. The Wrolstad court barely touched the second prong of the Berry analysis and clearly felt comfortable in saying that "we see no reasonable public policy justification for thus precluding [the plaintiff's] right to recovery for occupational disease." Wrolstad, 786 P.2d at 245.

In contrast, the limitation period found in §35-1-65 and §35-1-66 clearly represent an attempt on the part of the legislature to establish a ceiling on the filing issue. The statutes of limitation promote the public policy concerns of protecting employers and the State of Utah Second Injury Fund (now called The Employer's Reinsurance Fund) from responding or attempting to evaluate claims which have occurred in the distant past and which have aged to the point that "evidence has been lost, memories have faded, and witnesses have disappeared." Avis, 837 P.2d at 587, (citing Myers v. McDonald, 635 P.2d 84, 86 (Utah 81)).

Another presumption underlying the public policy concerns in these two statutes is that the applicant seeking compensation would act reasonably under the circumstances as well. The legislature

has clearly manifested a concern that causation both medical and legal have a reasonable basis for determination. The Legislature has shown that concern by enacting a statute of limitation. Such a piece of legislation evidences a strong legislative purpose and meticulous efforts to achieve that purpose. For similar reasons, so does the four year alternative statute of limitation for other non-worker's compensation personal injury claims under Utah Code Ann. §78-12-25(3) which has specifically been found to be constitutional in the case of McHenry v. Utah Valley Hospital, 724 F.Supp. 835 (D. Utah 1989).

In analyzing the Worker's Compensation Act and the benefit limitations contained in §35-1-65 and §35-1-66, it must be remembered that the Act in total is the substitute remedy for tort claims between employee and employer. The principle of fault was abolished and specific, though limited, benefits were granted. The Appellant has presented no arguments that would support his position that the substituted benefits are not reasonable under all circumstances associated with industrial accidents.

In summary, §35-1-65 and §35-1-66 clearly do not offend the second prong of the Berry analysis and are designed and drafted to promote the strong public policy concerns outlined above.

POINT IV

UTAH CODE ANN. §35-1-65 AND §35-1-66 ARE NON-VIOLATIVE OF THE EQUAL PROTECTION PROVISION OF THE UTAH CONSTITUTION.

Mr. Middlestadt's brief briefly argues that §35-1-65 and §35-1-66 are unconstitutional based on unequal protection grounds.

However, his brief is void of any substantive analysis or argument and he sets forth very little precedent or public policy argument to support his claims therein.

Article 1 section 24 of the Utah constitution which is essentially Utah's counter-part to the Federal Equal Protection Clause, requires that "all laws of a general nature shall have uniform application."

Just as the Utah Supreme Court has developed a two pronged analysis for the open courts provision test, so too has the court developed a two part test to determine whether statutes are in violation the equal protection provision of Utah constitution. The first prong requires that the law must apply equally to all persons within a class. The second prong requires that any statutory classification which gives different treatment based on that classification must be based on differences that have a reasonable tendency to further the objectives of the statute. Condemarin v. University Hospital, 775 P.2d 348, 352 (Utah 1989) (citing Malan v. Lewis, 693 P.2d 661, 670 (Utah 1984).

In Condemarin, the Utah Supreme Court indicated that the appropriate standard of review for applying an equal protection analysis requires a determination of whether or not the right protected in the constitution provision is fundamental. Id. at 358. Any activity which infringes on a fundamental right will be subject to strict scrutiny while activities which threaten non-fundamental rights will be subject only to a rational basis review. The Condemarin Court clearly recognized that the rights protected

by the open court provision are non fundamental insofar as the equal protection clause is concerned. Id. at 359. For this reason, this court need only determine whether the statutes challenged by Mr. Middlestadt and their inherent classifications are rationally related to a legitimate legislative purpose. Id. at 356.

Mr. Middlestadt's claims, as outlined in his brief appear to imply that any statutes of limitations which apply in the workmen's compensation context are unconstitutional as they modify common law rights. As previously mentioned however, the Utah Supreme Court has clearly upheld the workmen's compensation statute as constitutional. Masich, 191 P.2d at 612. However, the statutes of limitation found in Sections 35-1-65 and 35-1-66 clearly apply equally to all persons in the class, that class being individuals who are injured on the job and covered by workmen's compensation. Again, as with the open courts provision challenge, the statute of limitations are presumed valid and Mr. Middlestadt has failed in any meaningful way to overcome this presumption.

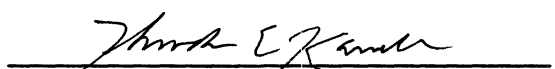
CONCLUSION

When the Berry analysis and its two prong test is applied to sections 35-1-65 and 35-1-66, it becomes clear that the statute of limitations outlined therein, are not in violation of either the open courts provision of the Utah constitution or the equal protection provisions of the same. Mr. Middlestadt had an alternative remedy under act and these statutes of limitation serve the clear legislative purpose of limiting the time in which claims

may be brought. After Appellant filed this writ, this Court has determined in the case of Avis v. Board of Review, 837 P.2d 584 (Utah App. 1992), that the statute of limitations in the Worker's Compensation Act were constitutional. This Court should therefore deny Appellant's request and affirm the Industrial Commission of Utah. In short, these statutes are clearly constitutional and the Industrial Commission was proper in denying Mr. Middlestadt's claims. Therefore respondent Mountain Fuel Supply respectfully requests this court affirm the Industrial Commission's decision denying Mr. Middlestadt additional benefits.

DATED this 14 day of December, 1992.

HANSON, EPPERSON & SMITH



THEODORE E. KANELL
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Continental Casualty

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed, postage prepaid, Two true and correct copies of the foregoing Brief of Respondents to the following on this 19 day of December, 1992.

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ADDENDUM

1. **Utah Constitution Article I, Section 11**
2. **Utah Constitution Article I, Section 24**
3. **Order of Dismissal**
4. **Order Denying Motion for Review**

Sec. 11. [Courts open — Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Sec. 24. [Uniform operation of laws.]

All laws of a general nature shall have uniform operation.

35-1-65. Temporary disability—Amount of payments—State average weekly wage defined.—(1) In case of temporary disability, the employee shall receive 66⅔% of his average weekly wages at the time of the injury so long as such disability is total, but not more than a maximum of 100% of the state average weekly wage at the time of the injury per week and not less than a minimum of $45 per week plus $5 for a dependent wife and $5 for each dependent minor child under the age of eighteen years, up to a maximum of four such dependent minor children not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 100% of the state average weekly wage at the time of the injury per week. In no case shall such compensation benefits exceed 312 weeks at the rate of 100% of the state average weekly wage at the time of the injury over a period of eight years from the date of the injury.

(2) • • • [Same as parent volume].

35-1-66. Partial disability—Scale of payments.—Where the injury causes partial disability for work, the employee shall receive, during such disability for not to exceed 312 weeks over a period of not to exceed eight years from the date of the injury, compensation equal to 66 2/3% of the difference between that employee's average weekly wages before the accident and the weekly wages that employee is able to earn thereafter, but not more than a maximum of 66 2/3% of the state average weekly wage at the time of the injury per week and in addition thereto $5 for a dependent spouse and $5 for each dependent minor child under the age of eighteen years, up to a maximum of four such dependent minor children, but not to exceed 66 2/3% of the state average weekly wage at the time of the injury per week.

The commission may make a permanent partial disability award at any time prior to eight years after the date of injury to any employee whose physical condition resulting from such injury is not finally healed and fixed eight years after the date of injury and who files an application for such purpose prior to the expiration of such eight-year period.

In case the partial disability begins after a period of total disability, the period of total disability shall be deducted from the total period of compensation.

In no case shall the weekly payments continue after the disability ends, or the death of the injured person.

In the case of the following injuries the compensation shall be 66 2/3% of that employee's average weekly wages at the time of the injury, but not more than a maximum of 66 2/3% of the state average weekly wage at the time of the injury per week and not less than a minimum of $45 per week plus $5 for a dependent spouse and $5 for each dependent minor child under the age of 18 years, up to a maximum of four such dependent minor children, but not to exceed 66 2/3% of the state average weekly wage at the time of the injury per week, to be paid weekly for the number of weeks stated against such injuries respectively, and shall be in addition to the compensation hereinbefore provided for temporary total disability, to wit:

(A) to (C) • • • [Same as parent volume.]

Permanent hearing loss caused by accident shall be determined and paid as follows:

"Loss of hearing" is defined as the binaural hearing loss measured in decibels with frequencies of 500, 1000 and 2000 cycles per second (cps) using pure tone air conduction audiometric instruments (ASA 1951) approved by nationally recognized authorities in the field of measurement of hearing impairment. Reduction of hearing ability in frequencies above 2000 cycles per second shall not be considered in determining compensable disability.

INDUSTRIAL COMMISSION OF UTAH

Case No. 91000560

PAUL J MIDDLESTADT, Applicant, vs. MOUNTAIN FUEL SUPPLY and/or CONTINENTAL CASUALTY; COMTROL and/or WORKERS COMPENSATION FUND; and EMPLOYERS REINSURANCE FUND, Defendants.	*	ORDER OF DISMISSAL

The above-entitled matter having been duly considered, and it having been determined that:

_____1. Respond to request for documentation.

_____2. Provide medical records.

_____3. Cooperate in investigating the case.

_____4. Actively prosecute this matter.

__xx__5. Other: There is no justiciable issue at this time.

And it appearing that the foregoing constitutes good cause for dismissing the claim,

NOW, THEREFORE, IT IS ORDERED that the claim of the Applicant be, and the same is hereby, dismissed without prejudice.

IT IS FURTHER ORDERED that any Motion for Review or specific written objection hereto must be filed with the Commission within thirty (30) days from date of this Order, or it shall be the final Order of the Commission, not sjubject to further review or appeal.

Timothy C Allen
Administrative Law Judge

Certified this 21st day of November 1991.
ATTEST:

/s/ Patricia Ashby

Patricia Ashby
Commission Secretary

"P Claim #

THE INDUSTRIAL COMMISSION OF UTAH

CASE NO. 91000559 & 9100560

PAUL J. MIDDLESTADT, Applicant,	*	
vs.	*	ORDER DENYING
MOUNTAIN FUEL SUPPLY and/or CONTINENTAL CASUALTY, COMTROL, INC., and/or WORKERS COMPENSATION FUND OF UTAH, and EMPLOYERS' REINSURANCE FUND, Defendants.	*	MOTION FOR REVIEW

The Industrial Commission of Utah reviews the Motion for Review of applicant which was received on December 17, 1991 in the above captioned matter, pursuant to Utah Code Annotated, Section 35-1-82.53 and Section 63-46b-12.

On April 2, 1985, the administrative law judge (ALJ) entered his Findings of Fact, Conclusions of Law and Order awarding the applicant benefits which arose from industrial accidents which occurred on August 16, 1976, and December 5, 1980. Subsequent to the 1985 order, the applicant had two surgeries on his back for which he seeks additional workers' compensation benefits.

Applicant claims that at the request of defendants' counsel, an attorneys' conference was held on November 19, 1991. He also claims that after the defendants' counsel had briefly outlined the present claim to the ALJ, the ALJ stated that applicant had no further claim to benefits based upon the dates of the industrial accidents, but that the defendants must pay the applicant's medical expenses pursuant to the April 2, 1985 order. On November 21, 1991, the ALJ entered an Order of Dismissal which stated that there was no justiciable issue at that time.

Applicant alleges that he cannot respond to the order since no motion was made by defendants, and since the ALJ failed to state the basis for the order. However, applicant states that he understands that the ALJ's statement at the hearing indicated that defendants must pay the medical expenses related to his industrial accident. Defendant Workers Compensation Fund does not dispute its responsibility for payment of these medical expenses. The disconnect arises as to whether the defendants are obligated to pay for temporary total disability compensation (TTC) and permanent

The United Parcel case is inapplicable since the tolling provision relied upon in United Parcel became effective after the date of Mr. Middlestadt's injuries. Id. at 141. In the instant case, the provisions of Section 35-1-99 which apply to Mr. Middlestadt mention no tolling provision, and further, defendant Workers Compensation Fund is correct when it states that neither United Parcel nor Section 35-1-99 apply in Mr. Middlestadt's case.

The statutes of limitation in Section 35-1-99 do not apply, and the relevant statutes of limitation are contained in Sections 35-1-65 and 66 which have been discussed previously.

Although the ALJ's order could have elaborated more on his reasons for dismissing applicant's claim, and the finding of no justiciable issue to be litigated, we believe that the application, the answer, and the order provide sufficient information on which to base a dismissal. The application was dated on May 20, 1991, and was apparently filed on that date or later. Applicant claimed two injuries, one on August 16, 1976, and the other on December 5, 1980. Both of these dates are well beyond eight years from the date of filing of the application.

Defendant Workers Compensation Fund's answer to the application clearly states at Paragraph Numbers Three and Five that any compensation based on the dates of injury alleged by applicant would be wholly barred by statutes of limitation.

Finally, applicant states that the Utah Constitution guarantees him a legal remedy for an injury done to his person. He cites Wrolstad v. Ind. Comm'n, 786 P.2d 243 (Utah App. 1990) for this proposition. The factual situation in the instant case is completely different. The applicant's injuries occurred, claims were filed, an order was entered, benefits were paid, and medical expenses related to the industrial injury will continue to be taken care of. In Wrolstad, the filing requirement based on Mr. Wrolstad's disease expired prior to the cause of action arising. This occurred in Mr. Wrolstad's case because of the extended latency period of his disease. Since the Sections 35-1-65 and 66 are not bridled with the constitutional infirmity of Wrolstad, we must uphold these statutes of limitation.

For all the previously stated reasons, we therefore hold that the ALJ's decision when viewed in the perspective of the entire record is substantially supported by the evidence.